87-1536
No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

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JACKIE D. SUGGS and DEBRA SUGGS,
Petitioners,

vs.

STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE CO.,
Respondents.

—o—

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

—o—

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QUESTIONS PRESENTED

1. The Court of Appeals for the Tenth Circuit reversed a jury verdict of the District Court of New Mexico after expressly finding there was "Substantial Conflicting Evidence" on the material issues. This opinion conflicts with decisions of every other Circuit Court and prior Tenth Circuit opinions. Can an Appellate Court reverse a jury verdict after conceding there was "Substantial Conflicting Evidence" to support the jury's verdict because the Appellate judges disagree with the result?

2. The Court of Appeals for the Tenth Circuit *expressly ruled* there was "Substantial Conflicting Evidence" on the material issues in this case. It reversed the jury verdict after concluding that the evidence although *substantial* was not sufficient to sustain the verdict. Does this so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision?

3. Does the finding by the Court of Appeals of the Tenth Circuit of "Substantial Conflicting Evidence" on the material issues in a jury trial and its reversal of the jury's verdict violate the Seventh Amendment provision of the United States Constitution that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, (other) than according to the rules of the common law."?

4. Does the absolute failure of the Court of Appeals of the Tenth Circuit to follow clearly established substantive common law of New Mexico on bad faith constitute such a departure from the accepted and usual course of judicial proceedings as to be violative of the rule established by this court in *Erie R.R. Co. v. Tompkins.*

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II. The reversal of the jury's verdict by the Court of Appeals for the Tenth Circuit after expressly finding there was "Substantial Conflicting Evidence" on the material issues violates the Seventh Amendment Provision of the United States Constitution that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States (other) than according to the rules of the common law." 19

III. The Court of Appeals for the Tenth Circuit correctly cited case law that established the substantive common law of New Mexico on bad faith, but patently refused to follow that case law and as such departed from the accepted and usual course of Judicial Proceedings as to be a violation of the Rule established by this Court in *Erie R.R. Co. v. Tompkins.* 21

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Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Petitioners Jackie D. Suggs and Debra Suggs petition the United States Supreme Court for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on November 18, 1987 and the Order denying the Petition for Rehearing having been entered on December 18, 1987.

OPINION BELOW

The opinion of the Court of Appeals (App. A) is reported at 833 F.2d 883 (10th Cir. 1987).

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JURISDICTION

The Judgment of the Court of Appeals (App. A) was entered on November 18, 1987 and the Petition for Rehearing (App. B) was overruled and entered December 18, 1987. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

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CONSTITUTIONAL PROVISIONS AND THE COMMON LAW

This Petition involves consideration of the Seventh Amendment to the United States Constitution and the Common Law of the United States as applied to Appellate Review along with the Common Law of the State of New Mexico which as to the issue involved herein will be adequately set forth in the reasons for granting the Petition.

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STATEMENT OF THE CASE

The Tenth Circuit reversed a jury verdict for Plaintiffs of $150,000.00 for bad faith in an insurance case after expressly finding there was "Substantial Conflicting Evidence" on the material issues in the case.

Petitioners Jackie D. Suggs and Debra Suggs brought suit against State Farm Fire and Casualty Co. and State Farm General Insurance Company for a Bad Faith Breach of their fire insurance contract which covered a mobile home located in Carlsbad, New Mexico. The basis of the action was in contract and the breach thereof in bad faith. New Mexico has long recognized as a matter of its common law the tort of bad faith dealing with its insureds by an insurance company. This has been stated as "a frivolous or unfounded refusal to pay". *Chaves v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. of App. 1976). *Woodmen Accident and Life Insurance Co. v. Bryant*, 784 F.2d 1052, 1056 (10th Cir. 1986) states New Mexico does not adhere to a single definition of bad faith in the context of insurance matters and has viewed it as a factual matter to be determined by a jury when such evidence goes to a jury. *Ambassador Insurance Company v. St. Paul Fire and Marine Insurance Company,* 102 N.M. 28, 690 P.2d 1022, 1024 (1984). In reliance upon that case law and other case law in New Mexico, clearly citing the rule for bad faith, the Plaintiff pursued its action and after discovery involving approximately fifty depositions and an eight-day jury trial, the jury returned a verdict of $26,530.01 for the amount of the loss under the insurance contract and $150,000.00 in compensatory damages for bad faith breach of that contract.

The Respondents set forth as a portion of their defense that they had a reasonable basis for believing that the Suggs lacked an insurable interest in the mobile home; that they had made material misrepresentations to the Respondents in the investigation of the case and that the

fire was intentionally set by or on behalf of the Petitioners. Both parties submitted experts in the fields of fire cause and origin investigation, electrical cause of fires, and forensic chemistry, all of whose testimony went to the jury for its consideration in determining the bad faith of the Respondents. Both parties also submitted evidence regarding the ownership of the mobile home and as to the representations made by the Petitioners to the Respondents concerning values and other items in the mobile home at the time of the fire.

The Court of Appeals of the Tenth Circuit reviewed the evidence relating to the issue of the ownership of the mobile home and concluded that the jury could have decided (and in fact did decide) that the Petitioners were the owners of the home. The Court furthermore reviewed the evidence involved in the other so-called "material misrepresentations" of the Plaintiffs and equally concluded that the jury could have determined (and in fact did determine) that there were no such misrepresentations concerning the Petitioners. The Court in its opinion at page 889 stated:

> "Rather, it (Respondent) argues that it acted in good faith in denying the Suggs claim because it had a reasonable basis for believing that a material misrepresentation was made. We disagree."

The opinion further states:

> "Because we hold that, under the facts of this case, sufficient evidence supports the jury finding that the Suggs had such an insurable interest and that State Farm had no reasonable basis for concluding otherwise, we find that State Farm had no reasonable basis

> for concluding that the Suggs had made a material misrepresentation."

Thus only one element was left in determining whether or not to sustain the jury verdict and that was whether or not there was sufficient evidence to sustain the jury's verdict of $150,000.00 for bad faith breach of the contract.

Incredibly enough, after finding the other two elements that were involved, being ownership and material misrepresentations, were jury questions the Appellate Court found that there was not sufficient evidence to sustain the jury's bad faith verdict even though it stated at page 891 of the opinion:

> "At trial there was *substantial conflicting evidence* as to the *causation of the fire* and the *propriety of the investigative techniques* used by the various experts utilized by *both parties.*" (emphasis supplied)

"Causation of the fire" and "the propriety of the investigative techniques" were the only two questions the jury had to answer in rendering its verdict on the issue of bad faith, and *no* evidence was cited in the Tenth Circuit Opinion pro or con: Just that reasonable minds could not differ even though there was "Substantial Conflicting Evidence". After the jury had returned its verdict, Respondents filed their motion for Judgment notwithstanding the verdict which was overruled by the trial judge, The Honorable Juan G. Burciaga, and the case proceeded to appeal. After the court's opinion that is attached hereto as Appendix A, the Petitioners called to the attention of the Tenth Circuit that they had completely misapplied the "substantial evidence rule" which is the basis of appellate review, as shown by Petitioner's Motion for Rehearing (App. C).

The Motion for Rehearing was denied December 18, 1987 (App. B).

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REASONS FOR GRANTING THE PETITION

The Tenth Circuit's finding of "Substantial Conflicting Evidence" on the material issues involving bad faith and its reversal on the basis that that evidence could not support a jury verdict is totally against the law in every circuit, including the Tenth Circuit's previous rulings on the issue of substantial evidence and will create total confusion in appellate review, as well as create an enormous number of new appeals.

The Tenth Circuit now stands alone as the only circuit in the Federal System that permits Appellate Review of a jury verdict after an express finding that there is "Substantial Conflicting Evidence" on the material issues in a case. *All* other circuits as well as this Court's rulings require adherence to the Substantial Evidence Rule.

Since 1943 when this Court decided *Brady v. Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239, the standard for appellate review in directed verdict cases and cases involving a judgment notwithstanding the verdict has been clear. This court stated:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

The standards for granting a motion for judgment notwithstanding the verdict are the same as those governing the directing of a verdict. A motion for judgment notwithstanding the verdict may be granted only when, without weighing the credibility of the evidence there can be but one reasonable conclusion as to the proper judgment. Where there is sufficient conflicting evidence, or insufficient evidence to conclusively establish the movants case, a judgment notwithstanding the verdict should not be granted. In considering the Motion, the court must view the evidence in the light and with all reasonable inferences most favorable to the party who secured the jury verdict. This approach governs the appellate court as well as the trial courts. 5A *Moore's Fed. Practice* Sec. 50.07(2).

This standard has been ruled on by every single circuit in the Federal Appellate System, as well as this court many, many times. Until the case at bar, not one single case has Petitioner been able to discover which cited that there was "Substantial Conflicting Evidence" on material issues in the case and then found that that evidence was not sufficient to support a verdict. To the contrary all the cases say exactly the opposite. The obvious reason is that this is so fundamental that no court has ever dared make such a finding and then render an opinion like this one.

In addition, this Court has set forth the rule on more than one occasion. In *Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), this Court stated that it was immaterial that evidence may equally support an inconsistent inference if in fact fair-minded men might draw from the evidence the inference sought by the party

against whom the verdict was directed. The question then is whether the evidence constitutes a basis from which the jury might have reason to infer for the party who obtained the jury verdict and it is no answer to that question to say that a conflicting inference might have been drawn therefrom.

In *Anderson v. Bessemer City,* 470 U.S. 564, 84 L.Ed. 2d 518, 105 S.Ct. 1504 (1985), which was a case involving 28 U.S.C. 52(a) being the rules on findings of fact by the court, this Court stated:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . this standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of rule 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, *Appellate Courts must constantly have in mind that their function is not to decide factual issues De Novo. . .* If a District Court's account of the evidence is plausible in light of the record viewed in its entirety, the *Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact,* it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous". (emphasis supplied)

This is a much less stringent doctrine than the one involving "Substantial Evidence" for the reason that the court has set up this rule for cases being heard without a jury. The Substantial Evidence Rule is much more

stringent, as set forth above, but even the language in *Anderson,* supra, is certainly helpful in this case.

The following are simply samples of at least one case from every circuit that has set forth this exact same principle which has been followed without exception until this case where the Tenth Circuit went off on a legally incredible and totally unsupportable tangent. Which, if allowed to stand, will create endless appeals and total conflict between the Tenth Circuit and the rest of the Circuits.

Court of Appeals for the 1st Circuit

Fact Concerts, Inc. v. City of New Port, 626 F.2d 1060 (1st Cir. 1978)

> "In reviewing the denial of a Motion for Directed Verdict we must examine the evidence in the light most favorable to the Plaintiff and determine whether there are facts and inferences reasonably drawn from those facts which lead to but one conclusion—that there is a total failure of evidence to prove the Plaintiff's case. —The Standard for review for denial of a Motion for Judgment n.o.v. is the same."

Court of Appeals for the 2nd Circuit

Samuels v. Health and Hospital Corporation, etc., 591 F.2d 195 (2nd Cir. 1979)

> " . . . another alternative open to a reasonable jury is that neither of the defendants was negligent. This is probably the conclusion that would have been reached by almost all judges on this record. *But it is the jury, not a judge,* which has the responsibility for the decision. The Federal Jury has wide power to draw inferences based upon general knowledge of its members and the evidence produced at trial . . ." (emphasis supplied)

Court of Appeals for the 3rd Circuit

Fireman's Fund Insurance Company v. Videfreeze Corp., 540 F.2d 1171 (3rd Cir. 1976)

> ". . . Conflicting evidence which could reasonably lead to inconsistent conclusions will not justify a judgment notwithstanding the verdict or a directed verdict. . . . It is the function of the trier of fact alone, the jury in this instance, to evaluate contradictory evidence and to draw inferences therefrom. . . . The trial judge . . . must confine himself to ascertaining whether the party against whom the motion is made adduced sufficient evidence to create a jury issue."

Court of Appeals for the 4th Circuit

Jones v. Pitt County Board of Education, 528 F.2d 414 (4th Cir. 1975) quoting *Jersey Insurance Company of New York v. Hefren*, 242 F.2d 136 (4th Cir. 1937)

> ". . . the Court of Appeals has broader powers in reviewing a district judge's findings of fact than in reviewing findings of a jury."

Court of Appeals for the 5th Circuit

Houston Oil and Minerals v. American International Tool, 827 F.2d 1049 (5th Cir. 1987)

> "Where there are two or more permissible views of the record evidence, an appellate court may not reverse the trial court's selection."

Court of Appeals for the 6th Circuit

Mowery v. Heckler, 771 F.2d 966 (6th Cir. 1985)

> "The reviewing court should not base its decision on a single piece of evidence and disregard other pertinent evidence in making a substantial evidence determination."

Court of Appeals for the 7th Circuit

J. Yannan and Associates, Inc. v. Integrity Insurance Company, 771 F.2d 1025 (7th Cir. 1985)

> "On appeal from a jury verdict, we are entitled to reverse only if the evidence points in one direction, and there was a different outcome below." *Citing Basham v. Pennsylvania Railway Co.,* 372 U.S. 699, 701, 83 S.Ct. 965, 967, 106 L.Ed. 2d 80 (1963)

Court of Appeals for the 8th Circuit

Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986)

> "Although the record contains conflicting versions of the various transactions, the jury obviously believed the Plaintiff's version of what happened. This court cannot disturb a jury verdict if there is substantial evidence, viewed in the light most favorable to the Plaintiffs to support the verdict."

Court of Appeals for the 9th Circuit

Baumlee v. State Farm Mutual Automobile Insurance Company, 473 F.2d 130 (9th Cir. 1974)

> "The jury is presumed to have acted correctly; thus where there are two alternative factual theories which might support the verdict, the verdict will be upheld if there is sufficient evidence to support either theory."

Court of Appeals for the 10th Circuit

Derr v. Safeway Stores, Inc., 404 F.2d 634 (10th Cir. 1968)

> ". . . A judgment n.o.v. is justified only if the evidence is so overwhelmingly prepondered in favor of the movant as to admit of no other reasonable conclusion."

Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985)

> "Since this appellate court will not retry facts, the jury's evaluation of conflicting evidence is conclusively binding on appeal."

Bennett v. Louzaire, 774 F.2d 1024 (10th Cir. 1985)

> "We do not and cannot retry determinations made by a jury. Our appellate function is completed when we are convinced that an evidentiary basis in the record supports the jury's verdict."

Court of Appeals for the 11th Circuit

Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987)

> "As we discussed above, there was conflicting testimony on the crucial issues in this case. The jury was called upon to make credibility determinations and to weigh the evidence. It was free to believe or disbelieve portions of testimony, and could reasonably chosen to believe Plaintiff's evidence and find there had been age discrimination. . . . Whether the trial judge or this court would have reached the same conclusion is irrelevant, as long as there is some support for the jury's decision."

Court of Appeals for the Federal Circuit

Glaros v. H.H. Robertson Company, 797 F.2d 1564 (Fed. Cir. 1986)

> "A court may overturn a jury's verdict only if the jury's findings are not supported by substantial evidence."

Court of Appeals for the D.C. Circuit

Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)

In that case, which was an employment discrimination case, the defendant moved for a judgment n.o.v., which was denied. The Court of Appeals held that the Plaintiff had introduced sufficient evidence from which a reasonable juror could have found evidence of discrimination.

Defendant's assertion of a different version of the facts was an insufficient basis to grant the motion, since the weighing of conflicting evidence was solely within the jury's province.

Petitioner is cognizant of the fact that the Tenth Circuit views the substantial evidence question as one of Federal Law but Petitioner has perused the holdings of twenty-five state courts at random, which are cited below, and finds that all of them have the identical standard. That being that the "substantial evidence" rule is used as the very foundation for Appellate Review. Each and every one of these cases finds basically that an Appellate Court may not review the factual determinations made by a jury by weighing the evidence and just because the court would arrive at a different decision than that arrived at by the jury is an insufficient reason for reversal. Suffice it to say, that Petitioner believes, based upon these twenty-five cases picked at random, that all fifty states, as well as all of the Federal Jurisdictions as has been cited in detail, use the substantial evidence rule as the basis for Appellate Review. See *Pugh v. Cook*, 153 Ariz. 246, 735 P.2d 856 (Ariz. App. 1987); *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 735 P.2d 1047 (Idaho App. 1987); *Frazier v. Farmers Ins. Exchange*, 1 Ark. App. 341, 615 S.W.2d 409 (Ark. App. 1981); *Vigil v. Sandoval*, 106 N.M. 233, 741 P.2d 836 (N.M. App. 1987); *Lingle State Bank of Lingle v. Podolak*, — Wyo. —, 740 P.2d 392 (Wyo. 1987); *Para-Medical Leasing Inc. v. Hangen*, 48 Wash. App. 389, 739 P.2d 717 (Wash. App. 1987); *Tetual v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (Kan. 1987); *Lawson v. State Farm and Casualty Ins. Co.*, 41 Colo. App. 362, 585 P.2d 318 (1978); *Manor v. Safeway Stores, Inc.*, 95 Idaho

732, 518 P.2d 1194 (1974); *Bartlett v. Frazer,* 218 N.J. 106, 526 A.2d 1141 (N.J. Super. AD 1987); *Township of Harbor Creek v. Pa. Commonwealth Ct. Staneva,* 529 A.2d 618 (PaComwlth 1987); *Cameron v. Cameron,* 179 Mont. 219, 587 P.2d 939 (1978); *Bering v. Share,* — Wash. —, 712 P.2d 918 (Wash. 1986); *Gutierrez v. City of Gallup,* 102 N.M. 642, 699 P.2d 115 (1985); *State, ex rel. S.LB. v. Dybdall,* 411 Neb. 649, 226 N.W.2d 473 (S.Ct. 1987); *Demming v. Grain Dealers Mutual Ins.,* 411 N.W.2d 571 (Minn. Ct. App. 1987); *Weyenberg Shoe Mfg. Co. v. Seidle,* 410 Wis. 604, 140 N.W.2d 373 (Wis. App. 1987); *Jim Murphy and Associates, Inc. v. LeBleu,* — Miss. —, 511 So.2d 806 (Miss. 1987); *Adams v. Grant,* — S.C. —, 358 S.E.2d 142 (Ct. App. 1986); *Huyck Corp. v. Town of Wake Forrest,* — N.C. —, 356 S.E.2d 599 (1987); *Steinberg By and Through Martinez v. Petta,* 139 Ill. App. 3d 503, 94 Ill. Dec. 187, 487 N.E.2d 1064 (Ill. App. 1 Dist. 1985); *Champion v. Wynn,* — Ind. —, 486 N.E.2d 543 (1985); *Brumtaeger v. Zeller,* 147 Vt. 247, 515 A.2d 123 (Vt. 1986); *Barlley v. Davis,* — Del. —, 519 A.2d 662 (1986); *In re Estate of English,* — Mo. —, 691 S.W.2d 485 (1985); *Electric Power Bd. v. St. Joseph Valley Struct.,* — Tenn. —, 691 S.W.2d 522 (Tenn. 1985); *Kalilikane v. McCravey,* — Haw. —, 737 P.2d 862 (Haw. 1987); *Roylance v. Rowe,* — Utah —, 737 P.2d 232 (Utah 1987).

After reviewing the basis of Appellate Review and setting forth the law, not only as set forth by this Court, but all of the circuit courts including the Court of Appeals for the Tenth Circuit in previous cases and all of the state courts that were cited, the opinion in this case is not only inconsistent with every single case cited, but is ab-

solutely incredible. In every case cited in this Petition, there was an argument about the evidence admitted at trial or lack thereof which would give rise to the court finding there was no substantial evidence.

Here the Tenth Circuit said the evidence at trial was more than conflicting, it was *substantially conflicting.* This is the same language as *Louisville and N.R. Co. v. United States,* 238 U.S. 1, 35 S.Ct. 696, 59 L.Ed. 1177, where this court said: "An Appellate Court cannot reverse findings when supported by *substantial* though *conflicting evidence.*" (emphasis supplied)

The Court of Appeals for the Tenth Circuit in this case made an absolute finding that there was "Substantial Conflicting Evidence" on the material issue of fact involving bad faith. In the opinion of the court in *Suggs v. State Farm Fire and Casualty, et al.,* 833 F.2d 883, 891 at note 5, the Court states:

> "At trial there was *substantial conflicting evidence* as to the *causation of the fire* and the *propriety of the investigating techniques* used by the various experts utilized by both parties." (emphasis supplied)

That *one* sentence is in essence the entire case on bad faith. Eight days of trial and voluminous discovery to that point had produced evidence concerning the "propriety of the investigative techniques" and by the court's own statement it was *substantial* and *conflicting.*

Under what is noted at section "B. Bad Faith" at page 890 of the opinion the Court states:

> "We have already disposed of State Farm's arguments on the insurable interest and material misrepresentation issues."

This seems equally incredible for the very simple reason is that it weighed the evidence and decided that the jury could find that there had been no misrepresentation and that the jury could find that there was ownership in the mobile home. The reason that it had to find this was because of the fact there was "Substantial Conflicting Evidence" on the issue and the most incredible part of it all is Note 12 at the bottom of page 890 which states:

> "State ~~Farm~~ concedes on appeal that it has *not proved* these defenses *conclusively*. Rather, it simply argues that it presented evidence from which the jury *could* have reasonably concluded that the Suggs lacked an insurable interest or made material misrepresentations or intentionally set the fire. Thus no bad faith occurred." (emphasis supplied)

That phrase in the note alone is sufficient along with the language in the rest of the opinion to completely dismiss any thought that this Appellate Court did not review the evidence and make its own fact finding, disregarding the jury. The Court admitted in its opinion that there was "Substantial Conflicting Evidence" and it states in the note that State Farm concedes that they have not proven the defenses conclusively. What else must be done for the Court of Appeals for the Tenth Circuit at that point but to simply say this is a substantial evidence case and it cannot interfere with the jury's findings.

Also, back in the second paragraph under "B. Bad Faith" it goes on to state:

> "However, we find State Farm's argument they had a reasonable basis for concluding that Jackie Suggs had intentionally burned the mobile home, and therefore did not refuse payment in bad faith, *more persuasive.*" (emphasis supplied)

That last phrase is the real gilding of the lily. It shows the Court of Appeals chose to be persuaded as a fact finder, rather than leaving that function to the jury as it is required to do.

When this Court reads this opinion in its entirety, it must conclude the Court of Appeals not only erroneously ruled on the issue of substantial evidence, it ignored it completely and made its determination based upon what persuaded them the most.

Thus the Tenth Circuit stands by itself in the entire Federal Court system in reviewing "Substantial Conflicting Evidence" and reversing jury verdicts based on the conflicts.

This is so foreign to the idea of Appellate Review as to be absolutely preposterous. Every court in every jurisdiction, be it Federal or State, will cite the *Suggs* case forevermore in saying that there was "Substantial Conflicting Evidence", but if the court is *more persuaded* for one side or the other, then it should review the evidence and make a decision based upon what persuades it the most as opposed to what the jury found in its verdict. This sword cuts in both directions, it does not favor a Plaintiff nor does it favor a Defendant. It simply favors anybody who loses in the District Court who can then cite *Suggs v. State Farm Fire and Casualty Co, et al.*, 833 F.2d 883 (10th Cir. 1987) for the proposition that any and

every Appellate Court should review the evidence and be a fact finder on its own regardless of the fact that there is "Substantial Conflicting Evidence" in the record which the jury considered. This decision alone would multiply the Appellate case load of every single appellate court in this nation and in today's world of expanded electronics and computerized research, this case will be found and will be cited by whoever loses a case and whose only prayer to win is to have the Appellate Court re-weigh the evidence. It will increase litigation costs and will clog the courts unmercifully.

There simply can be no justification for this type of total disregard by the Tenth Circuit of the Rules of Appellate Review and total disregard of this Court's rulings along with its own rulings and those of every circuit in the Federal System. No case has ever been clearer under this Court's rule 17.1(a) than is this one in determining that this decision is in conflict with the decision of another Federal Court of Appeals on the same matter. Equally, the Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of Judicial Proceeding that this court must correct it by granting this Petition for Writ of Certiorari.

Therefore, for the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit for the reason that the Tenth Circuit has so fundamentally violated the substantial evidence rule as to make a mockery both in the way it conflicts with all other Appellate Court rulings and in the way it has so far departed from the accepted and usual course of judicial proceedings, that this calls for an exer-

cise of this Court's power of supervision to protect the Appellate Courts from the absolute flood of appeals that such an opinion would produce.

II

The reversal of the jury's verdict by the Court of Appeals for the Tenth Circuit after expressly finding there was "Substantial Conflicting Evidence" on the material issues violates the Seventh Amendment Provision of the United States Constitution that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States (other) than according to the rules of the common law."

Petitioner has no quarrel with Rule 50(b) FED.R. CIV.P. which permits a granting of a Motion for a Judgment notwithstanding the verdict. The rule is certainly a useful tool for permitting a court to hear all of the evidence and then dispose of cases that have no merit and have not raised an issue of conflicting substantial evidence as that term is used at common law as hereinabove set forth.

Petitioner is aware of no decision by the Supreme Court absolutely upholding the constitutional procedure under Rule 50(b) but concedes the point within the bounds of the plain language of the Seventh Amendment to the Constitution of the United States. What makes this case entirely different is that the Court of Appeals for the Tenth Circuit found that there was "Substantial Conflicting Evidence" in the record concerning the most salient portion of the Petitioner's claim for bad faith damages, that being evidence as to the *causation of the fire* and the *propriety of the investigative techniques* used by the vari-

ous experts and still took the matter away from the jury. The language used in the opinion in this case by the Court of Appeals for the Tenth Circuit simply says in a nutshell that it is going to try this case as a trial "De Novo". The language at page 890 of the opinion states that the court finds the defendants' position as "more persuasive"; and the court points out that the Respondent conceded on appeal that it had not proved its defenses and coupled with the fact that it found that there was "Substantial Conflicting Evidence" can lead to no other conclusion than that the Tenth Circuit was absolutely dead-set on reversing this case for reasons that totally violate the concept of the common law rules of Appellate Review. The Seventh Amendment of the United States Constitution provides in its last clause that a case may not be examined otherwise than according to the rules of the common law. In 5A *Moore's Fed. Prac.* Sec. 50.07(2) it is stated as follows:

> "It must be recognized, however, as indicated in the opinion just quoted, that the constitutionality of the Judgment n.o.v. is dependent on adherence to the standards limiting the power of the Courts to invade the province of the jury."

This Court has said, in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798:

> "Under the Seventh Amendment to the Federal Constitution, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the Common Law, neither the United States Supreme Court nor a United States Court of Appeals can redetermine facts found by a jury any more than a United States District Court can predetermine them."

To permit this gross abuse of the jury's verdict by the Tenth Circuit would simply mean that the Seventh Amendment and the *Atlantic and Gulf* case have no meaning and that an Appellate Court can review the evidence in any fashion it likes and can be *more persuaded* even in the face of finding "Substantial Conflicting Evidence" and even where the Respondent "concedes" that it has not proven its defenses "conclusively". If even the Respondent concedes it has *not* proven its position conclusively, then obviously *another* conclusion could be drawn and the jury is entitled to, and did, draw another such conclusion.

Therefore, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit.

III

The Court of Appeals for the Tenth Circuit correctly cited case law that established the substantive common law of New Mexico on bad faith, but patently refused to follow that case law and as such departed from the accepted and usual course of Judicial Proceedings as to be a violation of the Rule established by this Court in Erie Railway Company v. Tompkins.

Petitioners brought this case under the New Mexico Common Law for an action based upon the bad faith dealing in an insurance contract between an insurance carrier and its own insured. Under New Mexico Law "there is an implied covenant of fair dealing which creates an obligation between the parties to act in good faith". *Ambassador Insurance Company v. St. Paul Fire and Marine Insurance Company*, 102 N.M. 28, 690 P.2d 1022, 1024 (1984);

Torres v. State Farm Mutual Auto Insurance Company, 705 F.2d 1192, 1195 (10th Cir. 1982); *Chaves v. Chenoweth,* 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). In *Woodman Accident and Life Insurance Company v. Bryant,* 784 F.2d 1052, 1056 (10th Cir. 1986), citing *State Farm General Insurance Company v. Clifton,* 86 N.M. 757, 527 P.2d 798 (1974), it is stated, "New Mexico recognizes the tort of bad faith delay or refusal to pay a valid claim by an insured." Nowhere does New Mexico's law define specifically that there is a single definition of bad faith in the context of insurance; *Ambassador Insurance Company,* supra. It leaves that determination to the jury based on a preponderance of the evidence.

The Tenth Circuit cites *General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 703 P.2d 169, 173 (1985), and states that in most cases the question of good faith is a question of fact for the jury.

There is no question that what has been cited above is the law on bad faith dealing between an insurer and its insured in the State of New Mexico. This is not disputed by the Tenth Circuit in its opinion and in fact all of what has just been recited in this Petition was also cited in its opinion as the law in New Mexico. In addition, the case of *State Farm Fire and Casualty v. Price,* 101 N.M. 438, 648 P.2d 525, was also cited in the opinion, but the following language was not:

> "There is evidence in the record to support an *inference* that State Farm knew a suit had been filed, or knew of facts which imposed a duty upon it to find out whether litigation involving its insured was pending, and that it consciously disregarded the facts and failed to defend its insured. The record also contains evi-

> dence which, *if believed by a jury,* supports State Farm's contention that Price failed to co-operate, causing substantial prejudice to the insured. There is also evidence which, if believed by the fact finder, could support State Farm's claim of collusion between Price, USAA, and the Moyas. . . . The facts on these issues are not so one-sided that a directed verdict should have been given. *Reasonable minds could differ on the evidence.*" (emphasis supplied)

The above language is perfectly applicable to this case and although the case was cited by the Tenth Circuit, it was not followed.

The law in New Mexico was properly given to the jury in instructions numbered 6, 17 and 18 and they were not contested on the basis as being improper statements of the law. Number six (6) stated:

> "In order to establish their claim of bad faith, Plaintiffs have the burden of proving by preponderance of the evidence that Defendants were partial to their own interest and did not give Plaintiff's interest equal consideration and that Defendant's denial of Plaintiff's claim was frivolous or unfounded."

Instruction number seventeen (17) states:

> "Under a contract of insurance, there is an implied covenant of fair dealing which creates an obligation between the parties to act in good faith. Thus an insurer has a duty to proceed in good faith in its dealings with the insured and in performance of its duties under the insurance contract. The insurer cannot be partial to its own interest, but must give its interest and the interest of the insured equal consideration. The obligation to deal fairly and honestly rest equally upon the insurer and the insured."

Instruction number eighteen (18) states:

> "The failure of an insurer to balance fairly its interest and those of the insured can constitute bad faith. On their contention of bad faith Plaintiffs, Jackie and Debra Suggs, must prove by a greater weight of the evidence that Defendants refusal to pay was frivolous or unfounded."

These matters were all known to the Tenth Circuit at the time of its rendition of this opinion. And even with this, we return again to footnote twelve (12) at the bottom of page 890 where the court cites the language that State Farm conceded on appeal that it had not proven its defense elements conclusively but argued that it had presented evidence from which the jury *could* have reasonably concluded that the Suggs lacked an insurable interest or made material misrepresentations or intentionally set the fire and thus there was no bad faith. And then citing the *Ambassador Insurance Company* case, supra at page 891 of the opinion the court states:

> "If the insurer, based on its honest judgment and acting on adequate information after competent investigation of the claim does not settle and instead proceeds to trial then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle."

In reading the opinion on bad faith as a whole and particularly the elements immediately above, it is apparent that the Tenth Circuit has chosen not to follow the substantive law of the State of New Mexico, but has chosen to follow its own rule that if there is some "good faith" then there can be no "bad faith". This is clearly not the substantive law of the State of New Mexico as had been cited in this Petition and was in fact cited in the Court's own opinion.

Under New Mexico law the *jury* was entitled to make all these decisions. Did the Respondent use *honest* judgment; was there a *competent investigation* and did they have *adequate information.* The jury heard the evidence and said "No".

This is such a departure from the case of *Erie Railway v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 that this court should grant this Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit for its blatant refusal to follow the doctrine of *Erie Railway v. Tompkins* and its failure and refusal to follow New Mexico substantive law which that case requires.

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CONCLUSION

The decision below violates the established standards of Appellate Review involving the substantial evidence rule in all of the circuits to the extent that it requires the granting of the Petition for a Writ of Certiorari in order to prevent chaos let alone confusion on the well-defined and long-established rules for Appellate Review. Furthermore, it is such a departure from the accepted and usual course of Judicial Proceedings as to call for the exercise of this court's power of supervision to correct the Tenth Circuit's view on granting Judgments notwithstanding the verdict and there is substantial conflicting evidence by its own opinion and that by granting the Judgment notwithstanding the verdict under these circumstances it is so inconsistent with the Seventh Amendment of the United States Constitution that it is a viola-

tion thereof. Finally, the Tenth Circuit's opinion is a violation of the doctrine set forth in *Erie Railway v. Tompkins* and for its failure to follow New Mexico Substantive Law. For the reasons stated above, Petitioners respectfully request this court grant Petitioners' request for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit to review the decision below.

Respectfully submitted,

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APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JACKIE D. SUGGS and DEBRA SUGGS,	)	
Plaintiffs/Appellees/ Cross-Appellants,	)	
v.	)	Nos. 85-1637 85-1853
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY,	)	
Defendants/Appellants/ Cross-Appellees.	)	
JACKIE D. SUGGS and DEBRA SUGGS,	)	
Plaintiffs/Appellees,	)	
v.	)	No. 85-2238
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY,	)	(Filed Nov. 18, 1987)
Defendants/Appellants.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
DISTRICT OF NEW MEXICO
(D.C. No. CIV 83-1591 JB)

Dick A. Blenden (Jeffrey B. Diamond with him on the briefs), Paine, Blenden, & Diamond, Carlsbad, New Mexico, attorneys for Plaintiffs, Jackie D. and Debra Suggs.

Eric S. Jeffries (Matthew P. Holt and Howard R. Thomas with him on the briefs), Sager, Curran, Sturges & Tepper, P.C., Albuquerque, New Mexico, attorneys for Defendants, State Farm Fire and Casualty Company and State Farm General Insurance Company.

Before MOORE, McWILLIAMS and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge.

Defendants State Farm Fire and Casualty Company and State Farm General Insurance Company (collectively "State Farm") appeal the denial of various post-trial motions following a judgment entered on a jury verdict awarding plaintiffs Jackie and Debra Suggs $176,530.01 in damages arising from State Farm's denial of an insurance claim.[1] The Suggs appeal the judgment entered on the jury verdict finding for State Farm on the Suggs'

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[1] Except where the context otherwise indicates, references in this opinion to the Suggs include both Jackie and Debra Suggs.

punitive damages claim. In a separate case consolidated on appeal, State Farm appeals the district court's order awarding the Suggs' attorney's fees of $180,631.64. We affirm in part, reverse in part and remand.

BACKGROUND

This case arises from the destruction by fire, on September 17, 1982, of a mobile home in which the Suggs had been living and which was insured by State Farm. The Suggs had wanted to purchase the home from Jackie Suggs' sister, Cynthia Hennington, but had been unable to obtain financing for the purchase. Accordingly, the Suggs agreed orally with Ms. Hennington to purchase the home and, in June, 1982 they became the co-obligors along with Ms. Hennington on a $13,500.00 note secured by the mobile home, with the understanding that the Suggs would refinance the home in early 1983 and pay Ms. Hennington $10,000. The Suggs then informed State Farm that they were the new owners of the home and they had their name substituted for Cynthia Hennington's as the named insureds. The insurance policy provided limits of $23,000 for the mobile home, $11,500 for its contents and $6,900 for additional living expenses incurred as a result of damage to or loss of the home. All payments relating to the mobile home, including insurance premiums, for the months of June through September, 1982 when it was destroyed by the fire, were made by Cynthia Hennington or Jackie Suggs' parents.

The fire occurred on September 17, 1982. Jackie Suggs testified at trial that he had been the last person in the mobile home, having left ten to fifteen minutes before the fire. He informed those investigating the fire

that he thought he had turned off all electrical appliances in the mobile home before the fire.

The Suggs presented a claim to State Farm for the loss of the mobile home and its contents, as well as for additional living expenses incurred because of the fire. State Farm paid $13,783.37 to the holder of the mortgage on the mobile home. It also paid the Suggs $1,086.62 for living expenses, but has refused to make any further payments.

After receipt of the Suggs' claim, State Farm hired a private investigating firm to investigate the fire. In addition, the State Fire Marshall's office investigated the fire. Both investigators concluded that the fire was intentionally set.[2] On March 9, 1983 the State Fire Marshall concluded that Jackie Suggs had intentionally set fire to the mobile home in order to obtain the insurance proceeds. Suggs was arrested and charged with arson and insurance fraud. A magistrate thereafter determined that there was probable cause to believe that Suggs was guilty of the charged offenses and bound him over for trial. State Farm denied coverage on March 25, 1983, on the grounds, among others, that the fire had been intentionally set by, or on behalf of, Suggs, that the Suggs did not have an insurable interest in the mobile home, and that the Suggs

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[2] The conclusion that the fire was intentionally set was based upon evidence concerning the heat and rapidity at which the fire burned, the burn patterns of the fire, the points of origin of the fire and the existence of traces of accelerants (charcoal lighter fluid and diesel fuel) in the mobile home.

had made material misrepresentations to State Farm.[3] The determination to bind Suggs over for trial was affirmed by the Eddy County, New Mexico district court on March 28. On August 15, 1983 the Eddy County assistant district attorney entered a "nolle prosequi" in the criminal arson case against Suggs stating that the matter required "further investigation to insure that prosecution is appropriate." R. Vol. I at 355. Meanwhile, in May 1983, the Suggs hired two experts of their own who investigated the fire and concluded that the fire was probably caused by an electrical malfunction.

On September 9, 1983 Jackie and Debra Suggs filed a complaint in state court, subsequently removed to the United States District Court for the District of New Mexico, seeking payment of insurance benefits under their insurance contract with State Farm and alleging that State Farm had denied them benefits in bad faith. They sought the face amount of the policy with interest. They further alleged that State Farm had acted "willfully, with actual malice, wantonly and in bad faith," thereby en-

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[3] State Farm argues it had substantial evidence that Suggs had both a motive and opportunity to set the fire. Jackie Suggs had lost his job about one month after agreeing to buy the mobile home and Debra Suggs was unemployed. The Suggs had outstanding debts at the time Jackie Suggs lost his job. While there was some conflicting testimony regarding the Suggs' credit rating, State Farm presented evidence that at the time of the fire, the Suggs' monthly expenses exceeded their monthly income. Evidence of an insured's "unhealthy financial position" is a factor suggestive of motive to commit arson. *See Jamaica Time Petroleum, Inc. v. Federal Ins. Co.*, 366 F.2d 156, 159 (10th Cir. 1966), *cert. denied*, 385 U.S. 1024 (1967). As to opportunity, as indicated previously, Jackie Suggs admitted he was the last to leave the home before the fire.

titling them to $500,000 in compensatory damages and punitive damages of $20,000,000. R. Vol. I at 121-24. State Farm asserted numerous defenses, including arson, misrepresentation of material facts and lack of an insurable interest. In October, 1983 the Suggs presented the information derived from their own investigators to State Farm. State Farm then hired an electrical expert who concluded that the fire was not of electrical origin. At some point after the law suit was filed, the Suggs presented a settlement offer of $200,000, which State Farm declined.

At the conclusion of an eleven-day trial to a jury, the jury concluded that the Suggs were entitled to $26,530.01 for breach of the insurance contract and $150,000 in compensatory damages, based on its determination that State Farm had acted in bad faith. The jury declined to award any punitive damages. The district court denied State Farm's post-trial motions for judgment n.o.v., for a new trial and for a remittitur.

State Farm appeals, alleging that the jury award of $176,530.01 was unsupported by the evidence. It also argues that the district court erred in excluding certain testimony and in denying its motions for dismissal as to the punitive damages claim, for a directed verdict and judgment n.o.v. on the bad faith issue and for a new trial. The Suggs appeal alleging that the district court erred in instructing the jury that it could only award punitive damages if it found, in addition to bad faith, that State

Farm acted in a malicious, willful, wanton or reckless manner.[4]

After the appeals in this case were filed, the district court awarded the Suggs $180,631.64 in attorney's fees pursuant to N.M. Stat. Ann. § 39-2-1, which permits an award of reasonable attorney's fees and costs to an insured if a court determines that the insurer acted unreasonably in failing to pay a claim. State Farm appeals that award.

Jurisdiction is based on diversity of citizenship. New Mexico law governs.

DISCUSSION

I.

State Farm challenges the sufficiency of the evidence supporting the award of $26,530.01 in contractual and $150,000 in compensatory damages. With regard to the $26,530.01 award for breach of contract, State Farm argues either that the award should be reversed in its entirety because the Suggs lacked any insurable interest in the mobile home and because the Suggs made material misrepresentations to State Farm or that it should be reduced. It thus challenges the denial of its motion for judgment

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[4] In their docketing statement, the Suggs alleged that the district court erred in denying the introduction of evidence concerning Suggs' criminal prosecution for arson. The Suggs have not argued this issue in their briefs; we therefore need not address it. *See Bledsoe v. Garcia*, 742 F.2d 1237 (10th Cir. 1984); *United States v. Gooch*, 603 F.2d 122 (10th Cir. 1974).

n.o.v. or for a remittitur on the breach of contract claim. State Farm further argues that the trial court erred in refusing to find, as a matter of law, that State Farm had not acted in bad faith in denying the Suggs' claim. It accordingly challenges the denial of its motion for judgment n.o.v. on the $150,000 jury award predicated on a finding of bad faith. Finally, State Farm challenges the denial of its motion for a new trial.

"In reviewing the grant or denial of a motion for judgment n.o.v., 'we employ the same standard of review as does the trial court.' " *Trujillo v. Goodman*, 825 F.2d 1453, 1456 (10th Cir. 1987) (quoting *Ryder v. City of Topeka*, 814 F.2d 1412, 1418 (10th Cir. 1987)). The trial court should only grant a judgment n.o.v. "when the evidence so strongly supports an issue that reasonable minds could not differ." *Ryder*, 814 F.2d at 1418 (quoting *Delano v. Kitch*, 663 F.2d 990, 1002 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982)). We must view the evidence and all reasonable inferences to be derived from that evidence in the light most favorable to the party opposing the motion. *Trujillo*, 825 F.2d at 1456; *Ryder*, 814 F.2d at 1418; *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984); *Jamaica Time Petroleum, Inc. v. Federal Ins. Co.*, 366 F.2d 156, 159 (10th Cir. 1966), *cert. denied*, 385 U.S. 1024 (1967). The decision of a trial court to grant or deny a motion for a new trial will only be overturned on appeal upon a showing of a "clear abuse of discretion." *Trujillo*, 825 F.2d at 1461; *United States*

v. Draper, 762 F.2d 81, 83 (10th Cir. 1985); *United States v. Ramsey*, 726 F.2d 601, 604 (10th Cir. 1984).[5]

A. *Breach of Contract*

In an action by an insured for failure to pay under an insurance contract "damages recoverable under this theory are those damages contemplated by the parties at the time of making the contract." *State Farm General Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798, 799 (1974). The Suggs sought only the face amount of the policy with interest. We hold that sufficient evidence supports the jury determination that the Suggs had an insurable interest and that they did not make material misrepresentations to State Farm. We conclude, however, that the question of the amount of the damages awarded must be remanded to the district court for a recalculation. Thus, we affirm the district court's denial of State Farm's motion for judgment n.o.v. and for a new trial on the breach of contract claim, but we reverse the denial of State Farm's motion for a remittitur and remand for a recalculation of damages.

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[5] While there has been some uncertainty as to whether state or federal law provides the substantive standard for reviewing the grant or denial of a judgment n.o.v. and a new trial in a diversity case, this circuit has stated that federal standards apply. *See Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983) (Fed. R. Civ. P. 59 governs "granting or denial of a motion for a new trial in diversity actions in federal court. State procedure does not apply."); *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 198 (10th Cir. 1980). Even under New Mexico law, the standard would be essentially the same. *See State Farm Fire and Cas. Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 44 (1984).

1. *Insurable Interest*

State Farm argues, without specific supporting authority, that the Suggs lacked an insurable interest in the mobile home because their purchase agreement was unenforceable since it was unwritten and therefore not in compliance with the Uniform Commercial Code provisions governing the transfer of mobile homes. We disagree. Under New Mexico law, "any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." *Universal C.I.T. Corp. v. Foundation Reserve Ins. Co.*, 79 N.M. 785, 450 P.2d 194, 195 (1969) (quoting *Harrison v. Fortlage*, 161 U.S. 57, 65 (1896)); *see also Forsythe v. Central Mutual Ins. Co.*, 84 N.M. 461, 505 P.2d 56 (1973); *Maroney v. United States Fidelity and Guaranty Co.*, 81 N.M. 111, 464 P.2d 401 (1970); *Fulwiler v. Traders & General Ins. Co.*, 59 N.M. 366, 285 P.2d 140 (1955); 4 J. Appleman, *Insurance Law and Practice* § 2123 (ed. 1969) ("[A] right of property is not an essential ingredient of insurable interest; any limited or qualified interest, whether legal or equitable, or any expectancy of advantage, is sufficient.").[6] Under that definition, the fact that the Suggs' agreement to purchase the mobile home was oral and arguably unenforceable is not necessarily determinative of the existence of an insurable interest in the home. "The ultimate issue is not the whereabouts of the legal title but

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[6] New Mexico has now codified that basic definition. *See* N.M. Stat. Ann. § 59A-18-6 (1984).

rather which party or parties have insurable interests. The two are not synonymous . . ." *Forsythe*, 505 P.2d at 59.

In this case, the Suggs had been living in the home for at least six weeks prior to the fire. They were co-obligors on a note secured by the mobile home. Presumably, upon completion of all payments due under the note, or under the planned refinancing arrangement, the mobile home would become theirs. It can hardly be said that they would not suffer a loss upon the destruction of the home.[7]

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[7] The cases upon which State Farm relies do not persuade us to the contrary. In *Fulwiler v. Traders & General Ins. Co.*, 59 N.M. 366, 285 P.2d 140 (1955), the New Mexico Supreme Court held that the named insured, the assignee of the purchaser of a car under a conditional sales contract, had an insurable interest in the car, despite the car's previous repossession by the original purchaser, because the assignee had not been released from liability under his purchase contract. We find nowhere in the opinion what State Farm calls "the Supreme Court's acquiescence in the insurer's argument that if the contract was void for want of an acknowledged writing, there was no insurable interest." State Farm's Answer Brief and Brief-in-Chief at 29. Similarly, *Universal C.I.T. Corp. v. Foundation Reserve Ins. Co.*, 79 N.M. 785, 450 P.2d 194 (1969), does not mandate the result State Farm seeks. In that case, Norman Bowman purchased a car for the use of his cousin. Bowman had title to the car placed in his name but arranged with the defendant insurance company to have the cousin named as the insured under a policy of insurance. After the cousin returned the car to Bowman and left the state, the car was damaged while being driven by someone Bowman permitted to use the car. The New Mexico Supreme Court affirmed the lower court's conclusion that the cousin lacked any insurable interest in the car, stating "[w]hen the insured voluntarily abandoned the use of the vehicle, his insuranble interest, if any, ceased to exist. . . . There was no contractual obligation between [the cousin] . . . with anyone. He could not have suffered any loss by its destruction." 450 P.2d at 195-96. Such is not the case here, where the Suggs had not voluntarily abandoned the mobile home, were co-obligors on a note secured by the home,

(Continued on following page)

Thus, we hold that State Farm cannot avoid payment under the insurance policy on the ground that the Suggs lacked an insurable interest in the mobile home.

2. *Material Misrepresentations*

The New Mexico courts have stated:

> As a general proposition, rescission is allowed where there has been a misrepresentation of a material fact, the misrepresentation was made to be relied on, and has in fact been relied on.

Hendren v. Allstate Ins. Co., 100 N.M. 506, 672 P.2d 1137, 1140 (Ct. App. 1983) (quoting *Prudential Ins. Co. of America v. Anaya*, 78 N.M. 101, 428 P.2d 640 (1967)). "[A] misstatement is material if it takes away the party's op-

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and had orally agreed to purchase the home. *See also Maroney v. United States Fidelity and Guaranty Co.*, 81 N.M. 111, 464 P.2d 401, 803 (1970) (lessee who had borrowed money from bank to build improvements on leased land and had entered into agreement, security agreement and bill of sale with bank concerning the improvements to secure repayment of loan had insurable interest in improvements, despite lack of title thereto); *Jerome v. Great American Ins. Co.*, 52 N.C.App. 573, 279 S.E.2d 42 (Ct. App. 1981) (named insured, who had deeded property to wife but who continued to use property as personal residence and remained liable on deeds of trust on property securing promissory notes had insurable interest in property); *Young v. State Farm Fire & Casualty Ins. Co.*, 426 So.2d 636, 640 (Ct. App. La. 1982) (person who did not own property but had been living for several months on property and who was obligated on several notes secured by the property had insurable interest, stating that the "right of occupancy alone gave [plaintiff] . . . an insurable interest"); *Deck v. Chatauqua County Patrons' Fire Relief Assoc.*, 73 Misc.2d 1048, 343 N.Y.S. 2d 855, 87 (N.Y. Sup. Ct. 1973) ("an insurer may not defeat its liability under a policy of fire insurance because of legal inadequacies of an insured's contract to obtain an interest in the property insured.").

portunity to estimate his risk under the contract." *Id.* (citing *Prudential Ins. Co.*, 78 N.M. 101, 428 P.2d 640 (1967)); *see also Long v. Ins. Co. of North America*, 670 F.2d 930, 934 (10th Cir. 1982) ("a misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.") (citing *Restatement (Second) of Torts* § 538(2)(a) (1977)). In most cases, questions of materiality are appropriately submitted to the jury. *See State Farm Fire & Cas. Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied*, 101 N.M. 438, 683 P.2d 44 (1984); *see also Ledbetter v. Webb*, 103 N.M. 597, 711 P.2d 874 (1985). Nevertheless, this court has stated that "materiality is a mixed question of law and fact that can be decided as a matter of law if reasonable minds could not differ on the question." *Long*, 670 F.2d at 934.

State Farm argues that the Suggs "made a material misrepresentation when, during their sworn statement, they represented they had entered into a written agreement for the purchase of the trailer before the fire." State Farm's Answer Brief and Brief-in-Chief at 32.[8] On appeal, State Farm does not seriously argue that the jury finding of no material misrepresentation should be overturned. Rather, it argues that it acted in good faith in denying the Suggs' claim because it had a reasonable basis for believing that a material misrepresentation was made. We disagree. As we have already indicated, the crucial

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[8] Apparently, as State Farm later learned, the written agreement was entered into after the fire and pre-dated to indicate it was created before the fire.

issue in determining State Farm's obligation to pay under its insurance policy with the Suggs is whether and to what extent the Suggs had an insurable interest in the mobile home. Because we hold that, under the facts of this case, sufficient evidence supports the jury finding that the Suggs had such an insurable interest and that State Farm had no reasonable basis for concluding otherwise, we find that State Farm had no reasonable basis for concluding that the Suggs had made a material misrepresentation. We accordingly affirm the denial of State Farm's motion for judgment n.o.v. or for a new trial on that issue.

3. *Evidence Supporting Award*

Even if the award of $26,530.01 should not be reversed in its entirety, State Farm argues it should be reduced. State Farm's briefs in this appeal are not consistent on the precise amount by which that award should be reduced. In its Brief-in-Chief, it asserts that the maximum amount established by the evidence is $15,147.52. It reaches this figure by totalling $954.86 for the value due the Suggs for the mobile home itself, $8,509.28 for the value of lost personal property, and $83.38 for documented unreimbursed living expenses.[9] In its Reply Brief, State Farm appears

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[9] State Farm asserts that the Suggs, because they lacked an insurable interest, had a maximum of $954.86 actually invested in the mobile home. That figure reflects monthly payments on the home made by Suggs' father or sister, assuming Suggs is liable therefore.

The Suggs' evidence of lost personal property consisted of their Proof of Loss listing the value of items lost as $9,509.28, $1,000 of which the Suggs agreed at trial was not claimed. Suggs

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to concede that the Suggs may be entitled to a maximum of $23,409.28. It reaches this figure by adding the $8,509.28 claimed for lost contents, the $5,600.00 claimed for additional living expenses and $9,300.00 for the value of the trailer ($23,000, the maximum amount permissible under the insurance policy, less $13,700, actually $13,783.37, paid to the holder of the note secured by the mobile home).[10] State Farm thus seeks to reduce the award by $3,120.73.

We hold that the district court must recalculate the damage award. Under the insurance policy the maximum amount permissible for loss of the mobile home itself was $23,000. But $13,783.37 was paid to the noteholder and accordingly cannot be awarded to the Suggs. Thus, the maximum amount the Suggs can recover for the home is $9,216.63. Both parties agree that the Suggs incurred additional living expenses of $5,683.38.[11] With regard to lost contents, State Farm asserts that, as the Suggs' Proof

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testified at trial that other lost items of value were not listed on the Proof of Loss, but he presented no details of those items. The Suggs presented receipts totalling $1,170 for room and board incurred between September 17 and October 31, 1982. Jackie Suggs testified at trial that he spent an additional $5,600 for living expenses after the fire, although he did not explain or document any details of those expenses. The parties stipulated that State Farm paid the Suggs $1,086.62 for living expenses.

[10] State Farm does, however, maintain its objection to any award for the value of the mobile home on the ground that the Suggs lacked any insurable interest therein.

[11] State Farm in its Brief-in-Chief suggests that $5,600 of the amount sought for additional living expenses was inadequately documented, but it appears to have conceded that issue in its Reply Brief. We therefore view State Farm as having waived its objection to that amount.

of Loss only establishes $8,509.28 payable for lost contents, no greater amount is recoverable, despite the Suggs' suggestion that they sought at trial the maximum policy amount of $11,500. The Suggs do not direct us to any other evidence besides the Proof of Loss establishing the value of their lost contents. The Proof of Loss is not a part of the record in this appeal. However, the Suggs may not recover more than they have established by sufficient proof. Assuming that the Proof of Loss only establishes the value of the lost contents at $8,509.28, the damages award must be reduced. We accordingly remand for a recalculation.

B. *Bad Faith*

In their complaint, the Suggs alleged that State Farm acted in bad faith in denying their claim. The essence of State Farm's defense is that it acted reasonably, and therefore not in bad faith. State Farms claims a reasonable basis for believing that the Suggs lacked an insurable interest in the mobile home, that they had made material misrepresentations to State Farm and that the fire was intentionally set by or on behalf of the Suggs.[12] It therefore alleges that the district court erred in denying its motions to dismiss as to punitive damages, for a directed verdict, for judgment n.o.v., and for a new trial on the bad faith issue.

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[12] State Farm concedes on appeal that it has not proved these defenses conclusively. Rather, it simply argues it presented evidence from which the jury could have reasonably concluded that the Suggs lacked an insurable interest, or made material misrepresentations or intentionally set the fire. Thus, no bad faith occurred.

We have already disposed of State Farm's arguments on the insurable interest and material misrepresentation issues. However, we find State Farm's argument that it had a reasonable basis for concluding that Jackie Suggs had intentionally burned the mobile home, and therefore did not refuse payment in bad faith, more persuasive.

Under New Mexico law, "there is an implied covenant of fair dealing which creates an obligation between the parties [to an insurance contract] to act in good faith." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022, 1024 (1984); *see also Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192, 1195 (10th Cir. 1982); *State Farm Fire & Casualty Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App.) *cert. denied*, 101 N.M. 438, 683 P.2d 44 (1984); *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976); *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct. App.), *cert. denied*, 84 N.M. 219, 501 P.2d 663 (1972). "New Mexico recognizes the tort of bad faith delay or refusal to pay a valid claim by an insured." *Woodmen Accident & Life Ins. Co. v. Bryant*, 784 F.2d 1052, 1056 (10th Cir. 1986) (citing *State Farm General Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974)). However, as the New Mexico Supreme Court has explicitly stated, "New Mexico does *not* adhere to a single definition of bad faith in the context of insurance matters." *Ambassador Ins. Co.*, 690 P.2d at 1025 (emphasis in original); *see also Lujan*, 501 P.2d at 680; *Price*, 684 P.2d at 532; *Chavez*, 553 P.2d at 709. Thus, bad faith failure to pay an insurance claim has been defined as "a frivolous or unfounded refusal to pay." *Chavez*, 553 P.2d at 709; *see also Woodmen Accident & Life Ins. Co.*, 784 F.2d at 1056; *United Nuclear Corp. v. Allendale Mut. Ins.*,

103 N.M. 480, 709 P.2d 649, 654 (1985); *Clifton,* 527 P.2d at 800; *Aragon v. General Electric Credit Corp.,* 89 N.M. 723, 557 P.2d 572, 575 (Ct. App.), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976). It has also been defined as follows:

> By bad faith we mean an absence of good faith by an insurer in its relations with its insured. [citation omitted].
>
> What is good faith? We do not attempt to give a complete definition because of the variety of situations held to involve a question of good faith. [citations omitted]. We use the term "good faith" in this case to mean an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration.
>
> . . .
>
> To fulfill the duty of giving equal consideration to the interests of the insured and the insurer there must be a fair balancing of these interests.

Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673, 680 (Ct. App.), *cert. denied,* 501 P.2d 663 (1972); *see also Torrez,* 705 F.2d at 1195; *Ambassador Ins. Co.,* 690 P.2d at 1025; *Price,* 684 P.2d at 532. In most cases, the question of good faith is a question of fact for the jury. *See General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 703 P.2d 169, 173 (1985).

Neither party cites any New Mexico decision on the question of bad faith in circumstances comparable to this case. Nonetheless, we believe that the only reasonable conclusion that the jury could have reached is that State Farm did not, in this case, act in bad faith. We therefore reverse the denial of State Farm's motion for judgment n.o.v. with respect to the jury award of $150,000.

In this case, State Farm's own investigators, as well as the State Fire Marshall, concluded that, based on the evidence gathered from investigations, the fire was intentionally set. At trial there was substantial conflicting evidence as to the causation of the fire and the propriety of the investigating techniques used by the various experts utilized by both parties. The Suggs do not seriously argue that at least some evidence existed which would suggest that Jackie Suggs had the opportunity and the motive to set the fire. The fact that the criminal arson charges against Suggs were ultimately dropped is immaterial and is not controlling in our review of the jury's verdict in this case. *See Rabon v. Great Southwest Fire Ins. Co.*, 818 F.2d 306, 309 (4th Cir. 1987) ("a prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than apply in a civil proceeding. In particular, a prosecutor's decision to *nolle prosse* may take into account many factors irrelevant in a civil suit, such as the higher standard of proof required for criminal conviction."); *see generally American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985); *Galbraith v. Hartford Fire Ins. Co.*, 464 F.2d 225 (3d Cir. 1972).[13] As the New Mexico Supreme Court stated in *Clifton:*

> Given the set of facts before us with the controversy over the entitlement to the proceeds of the policy, an

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[13] While the substance of the State Fire Marshall's report and conclusion was presented to the jury, all evidence relating to the criminal arson charges against Suggs was ruled inadmissible. Neither party appeals that evidentiary ruling. Thus, the jury's conclusion that bad faith existed was reached without reference to the criminal arson charges. We accordingly review that jury verdict without references to those charges.

> insurance company is justified in taking reasonable time and measures necessary to establish which party is entitled to the proceeds. The Company's actions here were reasonable and proper under the circumstances.

527 P.2d at 800. *See also Ambassador Ins. Co.*, 690 P.2d at 1026-27 ("If the insurer, based on its honest judgment and acting on adequate information after competent investigation of the claim, does not settle and instead proceeds to trial, then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle."). Therefore, although we are aware that judgments n.o.v. should be sparingly and cautiously granted, we hold in this case that it was error not to do so on the issue of bad faith. While reasonable minds could certainly differ on the question of whether State Farm's arson defense was established, reasonable minds could not differ on the question of whether, in this case, State Farm acted in bad faith.

C. *Punitive Damages*

The Suggs' appeal alleges that the district court erroneously instructed the jury on the burden of proof for assessing punitive damages. The claimed error was in instructing that, after finding bad faith, the jury could only award punitive damages if it further found, by a preponderance of the evidence, that State Farm "acted maliciously, willfully, wantonly or with reckless disregard for Plaintiff's rights." Jury Instr. No.6, R. Vol. I at 275. The Suggs argue that bad faith alone is sufficient to support an award of punitive damages and seek a new trial with proper instructions on that issue. The Suggs lodged no objection to the tendered instruction at trial.

Because we hold that no bad faith existed, we need not examine the correctness of the jury instruction on punitive damages, nor the question of whether it was proper, in the circumstances of this case, to submit the punitive damages claim to the jury. The Suggs concede that, absent a finding of at least bad faith, no punitive damages are permissible. *See Woodmen Accident & Life Ins. Co. v. Bryant*, 784 F.2d 1052, 1057 (10th Cir. 1986) "because Woodmen [the insurance company] did not deny . . . [the insured's] claim in bad faith, . . . [the insured's] claim for punitive damages fails."); *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649, 654 (1985) ("To assess punitive damages for breach of an insurance policy there must be evidence of bad faith or malice in the insurer's refusal to pay the claim.").

D. *Evidence Regarding Polygraph Examination*

In preparation for his defense of the criminal arson charges brought against him, Suggs retained Mr. Melvin Miller, a private investigator and polygraph expert, to conduct a polygraph examination of Suggs. In the course of a standard pre-polygraph examination interview concerning the questions to be asked during the polygraph test, Suggs refused to answer certain questions concerning the fire.[14] The district court granted Suggs' pre-trial mo-

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[14] The relevant interchange was as follows:

Q Jackie, did you deliberately cause this fire?

A Nope.

Q You didn't set it?

A Nope.

tion to exclude any reference to the polygraph examination or statements made to Miller during the pre-examination interview and the polygraph examination itself, on

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Q You didn't put any diesel fuel in there or charcoal lighter or anything to cause the fire?

A No.

Q Fully admit that this fuel was all around the place?

A Yes.

Q And underneath? Things of this nature, but you did not scatter any type of propellant whatsoever as far as the trailer?

A Nope.

Q You did not burn or cause it to burn?

A Nope.

. . . .

Q Okay. Regarding your trailer house fire September the 17th, did you set it on fire?

A This question is not supposed to be asked.

Q What do you mean?

A Well, me and Jeff [Suggs' attorney] talked about it the other day. And I told Jeff I wouldn't answer that question because that's not what's on trial here.

Q I thought you was charged with burning your trailer?

A No. That's, that's—the only thing they're going off on is all this God damn diesel and stuff in my trailer house and I told Jeff the other day and I'd—like I told him, I said, I told them right off start that I was scared, I left the God damn cooker on—

. . . .

Q . . . In that regard, then the way that you're looking at it, is for whether you put diesel fuel in the trailer?

A That's right.

(Continued on following page)

the ground that the examination failed to comply with the requirements stipulated by the New Mexico Supreme Court for the admission of such evidence. State Farm argues such exclusion was error, because it was not attempting to introduce the results of the polygraph or to establish that Suggs had failed to prove his innocence.[15] Rather, State Farm argues "the evidence was sought to be introduced for the sole purpose of showing that Jackie Suggs had refused to answer highly relevant questions posited by his own expert." State Farm's Answer Brief and Brief-in-Chief at 23. This, State Farm argues, is probative and relevant to the question of whether Suggs intentionally burned the home. In addition, State Farm claims the statement to Miller regarding the possibility that Suggs had left a hot plate on is relevant to the issues of Suggs' credibility, since he argued at trial that evidence

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Q Or any type of propellants?

A That's right.

Q In the trailer or even under it for a purpose to burn it?

A That's right. I told Jeff the other day, that I didn't want that one asked because I've got a lot of doubt in my mind that I caused it.

. . . .

Q . . . Regarding your trailer house on Standpipe Road, did you distribute any type of petroleum product inside it?

A Okay.

Q How does that sound?

A Just great.

Defendant's Ex. E at 30, 32-34, 36.

[15] According to Miller, the results of the polygraph were "inconclusive." R. Supp. Vol. I at 43.

supported the theory that an electrical malfunction started the fire, and to his good faith in his dealings with State Farm, since Suggs never mentioned this possibility to State Farm. State Farm seeks a new trial to permit evidence of Suggs' refusal to answer those questions.

Decisions of a trial court to admit or exclude evidence are within the sound discretion of that court, and, absent an abuse of discretion, will not be overturned on appeal. *See United States v. Wright*, 826 F.2d 938, 945 (10th Cir. 1987); *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1057 (10th Cir. 1983). We find no abuse of discretion here.

We agree with State Farm's assertion that it was not trying to introduce the results of the polygraph test, only the fact that Suggs refused to answer certain questions in the pre-test interview. Thus, the compliance or non-compliance of the polygraph examination with the procedures governing such examinations is immaterial. But, viewing this contested item of evidence in the context of the entire trial, we find no abuse of discretion in the decision not to admit it. The questions Suggs refused to answer related to whether he caused the fire. Because he evidently viewed those questions as including accidental causation of the fire he refused to answer. He did, however, answer other questions regarding whether he deliberately caused the fire and whether he intentionally distributed flammable products around the home, the method of arson allegedly used in this fire. Thus, viewed in context, we do not find his refusal to answer the particular questions so probative of any issue involved here as to outweigh any prejudice which may have resulted from the admission of that testi-

mony.[16] Nor do we see any abuse of discretion in the exclusion of the contested evidence despite State Farm's additional claims of its relevance to Suggs' credibility and good faith.

E. *Attorneys' Fees*

State Farm appeals the district court's award of $180,631.64 in attorneys' fees pursuant to N.M. Stat. Ann. § 39-2-1 (1978) which provides that "where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded reasonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim." The New Mexico courts "have not had occasion to discuss this statute [N.M. Stat. Ann. § 39-2-1]" and we therefore have no definitive guidelines for determing what conduct is "unreasonable." *United Nuclear Corp. v. Allendale Mut. Ins.*, 709 P.2d at 644 (Bivins, J., concurring in part; specially concurring in part). Nonetheless, section 39-2-1 has been described as "punitive" and thus "must be strictly construed and applied with caution." *Id.* at 664-65. Both parties essentially concede that the attorneys' fees issue rises or falls with the disposition of the rest of this appeal, as the award of attorneys' fees is only proper if State Farm acted "unreasonably." Because we have concluded that State Farm's denial of the claim was not in bad faith, but was instead based upon evidence accumulated after a

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[16] In addition, State Farm had ample opportunity at trial to question Suggs on the causation of the fire and to ask the questions Suggs refused to answer in the polygraph examination.

reasonable investigation, we hold that its denial of the Suggs' claim was not unreasonable. We therefore reverse the award of attorneys' fees.[17]

CONCLUSION

The decision of the district court denying State Farm's motions for judgment n.o.v. and for a new trial is AFFIRMED with respect to the breach of contract claim. The decision of the district court denying State Farm's motion for remittitur is REVERSED and the case is REMANDED for a recalculation of damages under the breach of contract claim. The district court decision is REVERSED with respect to the award of $150,000 in compensatory damages and $180,631.64 in attorneys' fees to the Suggs.

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[17] In so holding, we note that the Suggs have prevailed on their breach of contract claim and are entitled to benefits under the insurance policy. Nonetheless, State Farm's refusal to pay based on its claim that Suggs had himself burned or cause the burning of the mobile home was not unreasonable, even if it ultimately was not persuasive before the jury.

APPENDIX "B"

NOVEMBER TERM—December 18, 1987

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Dearell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

JACKIE D. SUGGS and DEBRA SUGGS,	)	
Plaintiffs-Appellees, Cross-Appellants,	)	
v.	)	Nos. 85-1637 85-1853
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY,	)	
Defendants-Appellants, Cross-Appellees.	)	
JACKIE D. SUGGS and DEBRA SUGGS,	)	
Plaintiffs-Appellees,	)	
v.	)	85-2238
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY,	)	
Defendants-Appellants.	)	

This matter comes on for consideration of Appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition fore (sic) rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker

ROBERT L. HOECKER, Clerk

APPENDIX "C"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JACKIE D. SUGGS and DEBRA SUGGS, Plaintiffs/Appellees/ Cross-Appellants, vs. STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY, Defendants/Appellants/ Cross-Appellees.	)	Nos. 85-1637 85-1853
JACKIE D. SUGGS and DEBRA SUGGS, Plaintiffs/Appellees, vs. STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY, Defendants/Appellants.	)	No. 85-2238

MOTION FOR RE-HEARING

COMES NOW Plaintiff in this cause, and petitions this Court for re-hearing, pursuant to Rule 40 of the Appellate Rules of Procedure, on the decision of this Court filed November 18, 1987. Pursuant to Rule 35, Plaintiff hereby suggests to this Court that the re-hearing be in Banc for the reason that consideration by the full Court is necessary to secure and maintain the uniformity of decision regarding the fundamental principle of substantial evidence and to avoid confusion concerning substantial evidence and the appropriateness of this Court's reversal of a District Court Order denying a Motion for a Judgment Notwithstanding the Verdict. That, for further reasons, this proceeding involves a question of exceptional importance in that the decision improperly decides and thoroughly emasculates the Bad Faith Law of New Mexico which this Court is bound to follow pursuant to *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 58 S Ct. 817, 82 L.Ed 118 (1938).

The opinion filed in this cause found that Judge Juan Burciaga abused his discretion in refusing to grant a Judgment Notwithstanding the Verdict and determined that reasonable minds could not differ that there was no substantial evidence to support the jury's finding of bad faith in this cause. Therefore, the following issues are presented for review:

1. The propriety of the District Judge's refusal to grant a Judgment Notwithstanding the Verdict regarding the issue of bad faith.

2. The substantial evidence rule as it applies to bad faith in insurance cases in New Mexico.

3. The refusal to order attorney fees and costs.

What makes this opinion an aberration is the Court, itself, at page 18, in the section concerning bad faith, stated:

> "At trial there was *substantial conflicting* evidence as to the causation of the fire and the *propriety of the investigating techniques* used by the various experts utilized by both parties." (Emphasis supplied)

If the "propriety of the investigating techniques" are in question, as this Court says in its opinion, and that "propriety" has conflicting evidence, then the Plaintiff *wins*. The Court can't look at the evidence that conflicts with Plaintiff's in these circumstances. To do so would violate the Substantial Evidence Rule which is the foundation of all Appellate review.

If, as the opinion admits, there is "substantial conflicting evidence", this case is over with. All conflicts in these circumstances are, and must be resolved, in support of the verdict and judgment of the Trial Court, and this case must be affirmed.

Sanchez vs. Home State Mining Company, 102 N.M. 473, 697 P2d 156, sets forth the rule that must be applied in this case. At 476, the Court said,

> "This Court is bound to view the evidence in the *light most favorable to support the Trial Court's findings,* (citations omitted) and to *disregard all evidence unfavorable* to that finding, (citations omitted). It is for the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistent statements of the witnesses and determine where the truth lies. The Appellate Court may not re-weigh the evidence, nor substitute its judgment for that of the trier of fact." (Emphasis supplied)

Re-weighing the evidence and substituting its judgment is precisely what this Court has done in this opinion. It is wholly immaterial and, as a matter of law, the Court cannot examine the evidence to find if the jury could have found for the Defendant. The sole and only test is: "Is there sufficient evidence in the record to sustain the jury's finding" indulging all inferences in favor of the Plaintiff while looking at the Plaintiff's own testimony, see *Sanchez case*, supra.

The author of this opinion overlooked, or misapprehended, the facts in this case and the law as it applies in New Mexico. Plaintiff believed that the ten volumes of Trial Transcript furnished by Plaintiff would be reviewed as a whole on the question of substantial evidence as a basis for upholding the Trial Court and jury. Consequently, no specific references to the ercord were made on this issue in the Plaintiff's Brief. If that assumption by Plaintiff's counsel was wrong, then this re-hearing should be granted because great quantities of evidence exist and are referred to herein to support the verdict.

In the interest of justice, this matter must be reviewed.

If failure to point out evidence in the record is not the reason for this opinion, then the Court has terribly misapplied the law as it relates to these facts.

The case involves an insurance carrier refusing to pay a fire insurance loss claim and the reasonableness of that refusal. After eight days of testimony, the jury, upon being thoroughly instructed as to the law of bad faith in New Mexico, along with the Honorable Juan Burciaga, were convinced that the investigation, and the resulting refusal to pay the fire loss, was unreasonable and in bad

faith. The opinion in this case simply states that the Appellate Court thinks it should substitute its judgment for that of a fact finder, and misapplies the basic rule that a fact finder will not be overruled if the finding is supported by evidence in the record as a whole, ignoring *all* conflicting evidence to the contrary.

Mr. Bowker, a long-time fire cause and origin expert, and Mr. Black, a fire investigator from Lubbock, Texas, with over 30 years' experience, both testified that the investigation was faulty. They went into great detail about why they did not think that the investigation was correct, and that the information given was not adequate for a proper judgment to be rendered as to whether or not an arson had occurred. This must be viewed in conjunction with the facts known at the time State Farm's decision was made, and Mr. Gulley, State Farm Claim Manager, testified, at page 661, that, as of the investigation of October 5, 1982, he had already made up his mind about what he was going to do. Anything that was learned during the trial, or subsequent to October 5, 1982, is absolutely immaterial to the decision made as that is the time Gulley made it.

Therefore, in following *Ambassador Insurance Company vs. St. Paul Fire & Marine Insurance Company,* 102 N.M. 28, 690 P2d 1022, 1024, there could not have been an "honest judgment" by Mr. Gulley because he was not acting on "adequate information" after "competent investigation". The jury was entitled to believe, or draw inferences from, the testimony of Black, Bowker, Dr. Reichart, and Dr. Davis that there was no competent investigation and therefore Gulley did not have adequate infor-

mation. The evidence that has been cited to this Court in this Petition for Re-Hearing is subject to no other interpretation than that of a clearly inadequate investigation if not, in fact, a conscious fraud by the evidence of the soil sample being positive for charcoal lighter fuel after a previous sample taken from the exact location was negative; the photographs introduced at trial showing the same day the second sample was taken, a mysterious Janet Lee charcoal lighter fuel can showed up in the State Fire Marshall's pictures sitting on a concrete pad in front of the home, and pictures taken at the same time on the same date by State Farm's investigator showed that the can was not there. The only thing this testimony can show is that the can was moved by one, or both, of these men, and that, in view of the fact it was never taken into evidence, it becomes highly suspect of conscious fraud. The Judge and jury heard this testimony for eight days; saw the demeanor of the witnesses, and the Court cannot, in any kind of judicial good conscience, and following the law, ignore what the jury and the Trial Judge did. It simply cannot be an abuse of discretion for the Judge to refuse to grant a Judgment N.O.V. by following *Sanchez vs. Home State Mining,* supra.

The Plaintiff must believe that the Court, in authoring this opinion, simply overlooked this absolutely gross testimony, along with all of the other testimony that has been proffered herein in arriving at this decision.

On page 16 of the opinion, at line 3, the Court states:

> "... *we find* State Farm's argument that it had a reasonable basis ..." (Emphasis supplied)

for refusing to pay and therefore there was no bad faith. Further, at page 17, after citing, quite properly, the law in New Mexico and the Tenth Circuit that

> "In most cases, the question of good faith is a question of fact for the jury." *General Motors Acceptance Corp. vs. Anaya,* 103 N.M. 72, 703 P2d 169, 173 (1985).

It is stated

> "Nonetheless, *we believe* that the only reasonable conclusion . . ." (Emphasis supplied)

that the jury could have reached was that State Farm did not act in bad faith. Incredibly enough, the Court ignores the testimony of the Plaintiff's expert witnesses, Mr. Bowker, Mr. Black and Dr. Reichart, and Dr. Davis, as well as both the insureds and the Defendant's Claim Superintendent, as an adverse witness. If their testimony is believed by the jury, as it was, then there is copious and substantial evidence to support the verdict.

The Court has rendered this decision as though the test for bad faith in New Mexico were: "Is there any evidence of good faith?".

The opinion discusses the fact that there is conflicting evidence, and because of such conflicting evidence, the jury would have been justified in finding there was no bad faith. That is clearly not the test.

State Farm Fire & Casualty vs. Price, 101 N.M. 438, 648 P2d 524, also cited in the opinion, states:

> "There is evidence in the record to support an *inference* that State Farm knew a suit had been filed, or knew of facts which imposed a duty upon it to find out whether litigation involving its insured was pending, and that it consciously disregarded the facts and

> failed to defend its insured. The record also contains evidence which, *if believed by a jury,* support State Farm's contention that Price failed to co-operate, causing substantial prejudice to the insured. There is also evidence which, *if believed by the fact finder,* could support State Farm's claim of collusion between Price, U.S.A.A. and the Moyas. . . The facts on these issues are not so one-sided that a directed verdict should have been given. *Reasonable minds could differ on the evidence.*" (Emphasis supplied)

Pursuant to that case, the test is: "Was there any evidence to sustain the verdict as rendered?". This test is such that it requires the Court to look at no evidence except that to sustain the Plaintiff's position in this case.

The *Ambassador Insurance Company case,* supra, states:

> "If the insured, based on its *honest judgment,* and acting on *adequate information,* after *competent investigation* of the claim, does not settle and instead proceeds to trial, then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle." (Emphasis supplied)

Therefore, if it is acting on "inadequate information" after "incompetent investigation", then by definition, it cannot make an honest judgment. Testimony in the record certainly sustains the fact that there was an incompetent investigation and therefore inadequate information for someone to make an "honest judgment".

Reiterating that the Court, at page 18 of the opinion, has already said there was "substantial conflicting evidence", which means Judge Burciaga committed no error. Plaintiff respectfully submits the following specific evidence.

1. Mr. Bowker and Mr. Black both testified that both State Farm and State Fire Marshall investigators failed to properly dig out and properly investigate the fire scene. (Tr. 469, 470, 471, 472, 479, 486, 488, 489, 850, 851).

2. State Farm and State Fire Marshall investigators failed to collect or examine beaded wire being evidence of a short circuit and Plaintiff told State Farm attorney Dan Lill about having the circuit breaker problems. (Tr. 657). (The Court at page 23 of the opinion, said, "since Suggs never mentioned this possibility to State Farm", and that statement in the opinion is just absolutely in error.)

3. There was a failure in any way to explain why the dirt samples taken beneath the bathroom floor sustained State Farm's theory that diesel fuel was flowing from the bathroom. (Tr. 610, 611, 622, 623, 624).

(a) The first soil sample taken by Ed Ansloan on September 23 was negative and was later identified as coming from under the bathroom, this being sample 6.

(b) That, on October 5, 1982, sample 10 taken from the exact same location, was positive, not for diesel fuel, but for charcoal lighter fuel, and that's the only date on which the State Fire Marshall ever came to the scene. (Tr. 746, 747).

4. The photos taken at the scene by both the State Fire Marshall and Mr. Ray, State Farm's investigator, shows a mysterious Janet Lee charcoal can at the scene in the Fire Marshall's photos, but not in those of State Farm. The jury could conclude that they were using this charcoal to "salt" sample 10, and they could infer, if not find, that

there was outright fraud going on. (Tr. 612, 613, 614, 615, 616, 617).

5. The wallet of a fireman, unknown to the Plaintiff, was saturated by diesel fuel while he supposedly crawled under the house. This is the same location that the second sample showed to be positive for charcoal lighter fuel, not diesel fuel, but it was so saturated that it got through his bunker gear onto his wallet and still no sample under the bathroom showed diesel fuel. (Tr. 622, 623, 624).

6. The Plaintiff, not knowing about the wallet, told attorney Dan Lill about the fireman sitting on the five-gallon diesel fuel can and he said this, not about the wallet, but about knowing that the can was still full of diesel fuel at the time the firemen were there. (Tr. 644, 645).

7. State Farm had the video tape showing the fireman sitting on the five-gallon diesel fuel can, and refused to recognize that this is the same fireman and that is where the saturation of his wallet came from, and with the Plaintiff not knowing about the video until having seen it at his preliminary hearing, surely makes the Plaintiff credible as a witness and it indicates that the evidence was not being fairly *evaluated* by State Farm. (Tr. 641, 642, 643, 1606, 1607).

8. There was a statement in the initial fire report to Mr. Gulley that a "relative" said that Plaintiff was "capable" of setting the fire when, in fact, she was a State Farm employee, and was not a relative. (Tr. 646).

9. The Defendant made no explanation of the fact that only one hole was burned in the floor, when the report said there were numerous burn holes, but, in fact, they

were fall-through holes from the wet floor by the firemen walking on the floor. (Tr. 638, 639).

10. There was no explanation of all the supposed flammable liquids being poured through the house and with the structure being still left standing when it was known to all of the investigators that a structure of this nature will burn rapidly. (Tr. 761, 762, 772, 773).

11. State Farm's investigator's investigative report said flammable liquid was poured throughout the house, but only *one* sample showed anything from inside the house as being diesel fuel, which was explained by the Plaintiff's boots from the oil field, and none of which was charcoal lighter fuel. (Tr. 627, 628, 630, 631, 799, 800).

12. Mr. Black and Mr. Bowker showed the jury that all burning was above the floor level and no damage was done to the lower portion of the two-by-four studding. (Tr. 777, 778).

13. There was not any property claimed lost in the fire by the Plaintiff that was not demonstrated to be lost, and there were only minor discrepancies on his claim as to the cost. (Tr. 740, 741).

14. The Defendants admit that a red flag is always looked at in arson cases being the removal of jewelry and personal pictures that cannot be replaced. An album of their two-year-old daughter and family pictures were found by State Farm at the scene, and never returned to the Plaintiff. (Tr. 651, 652, 653).

15. State Farm claimed, in their report, that jewelry claimed by the Plaintiff to be missing was not found at the scene. However, none was claimed by the Plaintiff,

and months later, the Plaintiff found a gold cigarette lighter and a bracelet saying "I love you Daddy" in one of the closets under debris that had not been dug out. (Tr. 653, 654).

16. State Farm demonstrated their callous disregard for the privacy of their insureds, which the jury could believe was evidence of bad faith, by asking Mrs. Suggs the age of her panties and bras during the proof of loss statement under oath, even though they knew nobody could answer those questions. (Tr. 1594, 1595, 1596).

17. The only evidence at the time of the decision to not pay the fire loss concerning the Plaintiff's financial problems was that he had three notes at the bank, two of which had been paid timely, and no checking to see if he had any collateral source of income, such as from his parents, was done until just before the trial. (Tr. 646, 647). (This last matter was referred to in the Court's opinion, and has no bearing on the financial problems, because it was not known at the time the decision was made by Mr. Gulley to deny the claim.)

18. State Farm first asked for, and obtained, on October 18, 1982, releases for credit information from the insureds which were not used to check anything until after the claim was denied. (Tr. 657, 658, 1598, 1599).

19. The State Farm representative stated that he had his mind made up about the fire as a result of Mr. Ray's report, even with all that's wrong with it as has been described in the previous eighteen points. The exact testimony is:

> "Question by Mr. Blenden", Mr. Gulley, you still believe what's in Mr. Ray's report, don't you?

"Answer: What was reported, yes.

"Question: And that still is the bottom line, that still's the basis on which you built your decision to deny this claim?

"Answer: Correct." (Tr. 661).

Anyone, including every Judge of the Tenth Circuit that reads this Petition for Re-Hearing, would believe it to be preposterous to state they had been fairly dealt with by their own insurance company if they had the above facts presented in the adjustment of their own fire claim and they would be outraged by it.

Particularly, when one looks at the items, such as an employee of State Farm being called a relative of the Plaintiff; the mysterious charcoal can showing up in one photograph but not in another, and never being taken into evidence; the samples of soil being so obviously erroneous, or tampered with; having possession of a video tape explaining the wallet having diesel fuel on it; and not telling the insured all of these facts, it is absolutely impossible for Plaintiff, or his counsel, to understand how this Court could have concluded in the opinion that there was no evidence, or that reasonable minds could not differ on the element of bad faith.

That is a disingenuous decision and must not be left to stand in the face of conscience, common sense, judicial propriety, and fair-dealing.

The last matter that must be addressed by this Court is that of Section 39-2-1 N.M.S.A., 1978 Comp., being the attorney fee and cost statute.

That statute provides as follows:

> "Where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded reasonable attorney's fees and costs of the action upon a *finding* by the *Court* that the insurer acted unreasonably in failing to pay this claim." (Emphasis supplied)

The Trial Court in this case made a finding in his decision to award attorney fees that there was an unreasonable refusal to pay the claim. The Court can make this finding of "unreasonableness' (sic) even if there were to be no finding of bad faith.

In this case, this Court, even in the original opinion, found that Plaintiff was entitled to his contractual money. Therefore, it was unreasonable and wrong to withhold the money. If this Court does not find that Plaintiff is entitled to his attorney fees which, incidentally, were in the amount of approximately $135,000.00, and not $180,000.00, as set forth in the opinion, then no insured can ever bring an action against his own insurance company for a claim as small as this one and expect any attorney to accept it. State Farm, in this case, by refusing to pay the claim and putting this matter to trial caused something in excess of fifty depositions to be taken and, as was shown by the Court's Order Granting Attorney Fees and Costs, Plaintiff expended in excess of $51,000.00 in costs. The Court granted those costs in the amount of approximately $45,000.00 in addition to the attorney fees.

CONCLUSION

Therefore, Plaintiff respectfully petitions this Court to re-examine the matters contained in this Petition and

to carefully observe that Plaintiff is 100% correct in its statement of the law and in its statement of the facts concerning this case. Plaintiff respectfully requests that, upon re-hearing, the Court withdraw its opinion in this case and enter an opinion sustaining Judge Juan Burciaga in his Judgment entered in February of 1985.

Respectfully submitted,

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